50006

66 I A 2 1

BUDO VUKASINOVICH, Plaintiff-Appellant, v. LJUBOMIR RANKICH and DJOLE LIPOVICH, a/k/a GEORGE LIPOVICH, a/k/a GEORGE A. LIPOVICH, a/k/a GEORGE LIPOVIC, Defendants-Appellees.	)	APPEAL FROM THE MUNICIPAL DISTRICT OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal taken from an order dated July 7, 1964, vacating a default order and judgment entered on January 3, 1964, in an action brought to recover damages under the Dram Shop Act.

On October 29, 1963, plaintiff brought suit to recover damages for personal injuries sustained by him when plaintiff was slugged and beaten by a person. An Alias Summons was issued December 4, 1963, returnable December 18, 1963, as to defendant Lipovich. On December 12, 1963, the Alias Summons was filed in the Municipal Court Clerk's Office showing service on Mrs. George Lipovich on behalf of George Lipovich, and bearing the following return of the bailiff:

> Served this writ on the within named defendant, George Lipovich at his usual place of abode by delivering a copy thereof with a Praecipe and Statement of Claim and Affidavit attached thereto, stamped by the Clerk, "A True Copy," to Mrs. G. Lipovich (wife), a person of his family of the age of ten years or upwards and informing her of the contents thereof, in the City of Chicago, this 10th day of December, 1963.
>
> Matthew W. Bieszczat, bailiff, by George Hagopian, Deputy, and also by sending through the United States Post Office on the 11th day of Dec. 1963, a copy of the within writ in a sealed envelope, with postage fully prepaid, addressed to the said defendant at such usual place of abode.

Defendant Lipovich failed to file his appearance or otherwise plead. On January 3, 1964, judgment was entered in favor of plaintiff in the amount of $7,500.00 and costs. The order recited that the court heard the evidence and found both defendants guilty in the manner and form as charged in plaintiff's statement of claim, and assessed the damages in the amount of $7,500.00. Subsequently, an execution and levy issued.

On June 24, 1964, defendant Lipovich filed a motion with a supporting affidavit, apparently under Ill. Rev. Stat. (1963) Chapter 110, Sec. 72, to vacate the judgment as to him and to stay the levy and sale set for 10:00 A.M. that day. The judge stayed all proceedings, entered the motion and set the hearing for July 7,1964. The affidavit of defendant Lipovich (hereinafter called defendant) claimed he had a minimal ability to read and write English; that the first knowledge he had of this proceeding was on May 18, 1964; that he was informed that his present wife, Mrs. George Lipovich, was served with a summons directed to him, but at the time summons was served he was divorced and not remarried.

On July 1, 1964, defendant filed an amended motion to open the judgment, with leave to defend, together with his supporting affidavit and the supporting affidavit of his wife, Anna Lipovich. He apparently abandoned his first motion to vacate and set aside the judgment. He stated in his amended affidavit that he first learned of this case June 18, 1964 (he said May 18, 1964, in his first affidavit), and then hired an attorney; that he was the owner and lessor of the property; and that he was informed that the present Mrs. George Lipovich was served with summons on his behalf, but that he was not married at the time. He stated further that he had a valid defense, since the incident complained of did not result from the sale of liquor on his property.

The supporting affidavit of the present Mrs. George Lipovich, stated that she has lived with defendant for the past ten years at 2244 South Blue Island Avenue; was married to him on June 25, 1964, (which was the day after the first motion to vacate on June 24, 1964), in Chicago; and that she used the name Anna Markov and not Mrs. George Lipovich until June 25, 1964. The affidavit uses the name Anna Markov, but is signed "Anna Lipovich." There is a denial that she was served with summons.

At the hearing on June 24, 1964, the court directed the attorney for defendant to have defendant and his wife in court at the next hearing, saying, "Subpoena her if you have to because you have to prove by clear and convincing proof that the defendant was not properly served. The record shows on its face that the bailiff served his wife who ordinarily would be a member of the household." Plaintiff was ordered to produce the bailiff at the next hearing.

At the next hearing on July 7, 1964, plaintiff produced the bailiff, George E. Hagopian, who was examined by the court. He stated that he had been a bailiff since 1958 and had an independent recollection of serving a woman with the name of Mrs. George Lipovich, that a bartender told him the woman was Mrs. Lipovich and that the woman asked him to stay for lunch.

Defendant was in the court room, but refused to testify, and therefore was not cross-examined by plaintiff. Mrs. George Lipovich failed to appear to testify at the hearing.

The trial court stated that "there was nothing to indicate defendant ever found out about the service on the woman he allegedly lived with who was not his wife." The court then entered the following order vacating the judgment of January 3rd, 1964:

> Now comes the defendant GEORGE LIPOVICH only and moves the court to vacate judgment of JANUARY 3rd, 1964, and the court being fully advised in the premises, sustained said motion and thereupon it is ordered that judgment of JANUARY 3rd, 1964, be and the same is hereby vacated, set aside and for naught esteemed as to GEORGE LIPOVICH only and
>
> It is further ordered by the court that leave be and the same is hereby given defendant to file answer within TWENTY (20) DAYS and that this cause be and the same is hereby set for trial in Room 910 on OCTOBER 6th, 1964.
>
> Minimum Appeal Bond set at TWO HUNDRED DOLLARS ($200.00).

At the outset, an examination of the record reveals that service was made in another area of the same building occupied by defendant and that the area where service took place was not the usual place of abode

of defendant. There was no finding by the trial court that the service did not take place at the usual place of abode of defendant. The trial court did find, however, that service was not on the wife of defendant, but in its order vacating the judgment of January 3, 1964, ordered that defendant file an answer within twenty days. Therefore, the court must have found both that service on the present Mrs. George Lipovich was not valid and that defendant waived any jurisdictional defense by asking for leave to defend. Therefore, we must determine, one, whether defendant exercised diligence in bringing his motion to vacate the judgment of January 3, 1964, and two, whether there was an abuse of discretion by the trial court in granting defendant leave to defend plaintiff's alleged cause of action. Dann v. Gumbiner, 29 Ill. App.2d 374, 381, 173 N.E.2d 525 (1961).

The affidavit of defendant reveals that he first gained knowledge of the proceedings on June 18, 1964, when he was served with an execution summons and notice that a levy had been made on certain of his real estate. He immediately filed his petition. Therefore, we find that there was diligence on the part of defendant.

We further find the action of the trial court in setting aside the order was not an abuse of its discretion. A meritorious defense was set out by defendant in his affidavit. For the above reasons the order is affirmed.

ORDER AFFIRMED.

BURKE, P.J., and BRYANT, J., concur.

50246

66 I.A.2 162

A

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
JOHN L. DISMUKE,
Defendant-Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY
CRIMINAL DIVISION

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

On an indictment charging armed robbery the defendant was found guilty and sentenced to the penitentiary for a term of not less than one year nor more than five years. He appeals from the judgment.

Corrine Moore is the wife of Joseph Moore who owns a tavern and liquor store at 701 East 75th Street, Chicago. On Sunday, July 12, 1964, at about 1:00 P.M. she went to the tavern to bring change for the cash register. At the time the only other person there was the bartender, Charles Thomas. Shortly after she arrived a man walked in and asked the price of a bottle of vodka. Two other men walked in behind him. One of these men was the defendant. The first man then went to the door, closed it, and announced a holdup. There is a dispute in the testimony as to who closed the door. The second man pulled a gun and the third man, the defendant, stood behind him. The man with the gun ushered the bartender and Mrs. Moore into the washroom. After a period of five or ten minutes, the captives came out of the washroom, made a search and found that $400 had been stolen.

Defendant and his two companions fled the scene and by automobile went to the 57th Street Beach, where, according to the evidence introduced by the People, defendant received part of the proceeds. From an examination of photographs produced by the police, the bartender identified a photograph of defendant. About two weeks after the robbery the defendant was arrested in Peoria. He was brought to Chicago where he was identified by the bartender and Mrs. Moore. The defendant had been in the tavern previously. Prior to the robbery the defendant lived a block from the tavern for two weeks. The arresting officer testified

that on the way back to Chicago the defendant said that he received $17 of the stolen money and that this was the first robbery that he "had gone on" with the other men.

The first point presented by the defendant is that the People failed to prove him guilty beyond a reasonable doubt. He concedes that he was present when the robbery occurred. He says that the record shows that he did not actively and voluntarily participate in the robbery. The People answer that the evidence shows beyond all reasonable doubt that the defendant was guilty of the crime of armed robbery. The State says that the circumstances in the case at bar show a common design to do an unlawful act. The defendant entered the tavern in the company of two other men. Nothing was purchased and immediately upon entering, one of the men announced a holdup and another drew a gun. The defendant placed himself behind the man with the gun named "Pops" and closed the door when the man with the gun told him to do so. The defendant was well acquainted with one of the robbers; they were schoolmates in high school. In answer to the question "Did you do anything actively in that robbery?" the defendant answered "I closed the door." To the question "And at the time you closed the door, did you know there was about to occur a robbery?" the defendant answered "I heard him say it." The defendant was referring to the robber with the gun. The defendant denied participating in the robbery. He denied that he told the officer or anyone that he got any money from the proceeds of the robbery.

The defendant left the tavern with the other men and took part of the proceeds. One of the participants drove the defendant to the beach at 61st Street and Lake Michigan in Chicago, where defendant's car was parked. Defendant did not notify the police. That day the defendant drove to his home in Peoria.

The evidence shows that the defendant entered the tavern with his two acquaintances, remained there with them while the robbery was committed and then left with them when the robbery was completed. He then shared in the proceeds of the robbery. No one heard him protest or

saw him evince surprise. There was also an oral admission by the defendant to the police officer who made the arrest that this was the only robbery he had gone on with Bunny Wilson and the other defendant. The fact that the defendant had been in the tavern on prior occasions as a patron, does not in the light of the other circumstances support his argument that it is improbable that he participated in the robbery. The defendant was from out of town. His assertion that he told the bartender that he was from Peoria was contradicted by the bartender. We find that the evidence shows a common design to do an unlawful act and supports the finding and judgment that he is guilty as a principal beyond a reasonable doubt.

The second point urged by the defendant is that the State failed to prove ownership or possession of the property allegedly taken. The indictment charges the defendant with taking $400 from the person and presence of Corrine Moore. Defendant insists that the record shows that Corrine Moore did not own or have possession of the money taken nor was any money taken from her person during the robbery and that this failure of proof entitles him to a reversal. Ill. Rev. Stat. 1965, Chap. 38, § 18-1(a) reads:

> "A person commits robbery when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force."

Defendant says that the record shows that the ownership of the $400 was in Joe's Three Corner Tavern and that the control was in Charles Thomas. The money was the property of the owner of the tavern, Joseph Moore. Charles Thomas, the bartender, was employed by Joseph Moore.

We think that the evidence shows that Corrine Moore was the agent of her husband in the operation of the tavern; that it was within her authority to supervise the employees and that she was in charge at the time of the robbery. We are satisfied that at the time of the robbery Mrs. Moore was in custody and control of the money.

The judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, J., and LYONS, J., concur.

(32825—9-66) 14

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HAROLD F. TRAPP, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 29th day of December A. D. 19 65, there was filed in the office of the said Clerk of said Court an opinion of said Court, in words and figures following:

General No. 10611 Agenda No. 1

STATE OF ILLINOIS
IN THE APPELLATE COURT
FIFTH DISTRICT

People of the State of Illinois.	
Plaintiff-Appellee	Appeal from
vs.	Circuit Court
Cleve Heidleberg, a/k/a Clede Heidelberg,	Sangamon County
Defendant-Appellant	

Smith, J.:

In a bench trial, jury having been waived, defendant was acquitted on the charge of burglary as alleged in Count I. He was found guilty on Count II, III, IV and V, charging attempt to commit rape, intimidation, aggravated battery and aggravated assault, respectively. Sentenced to serve one to two years in the Illinois Penitentiary, he appeals from that conviction and the sentence.

Defendant claims (a) that the trial court erred in permitting the indictment to be amended on its face to show the occurrence date was March 18, 1964, instead of March 20, (b) that Count I and II designate the place of the occurrence

as "a building of Virgin Mary Hamilton" in Sangamon County and Counts III, IV, and V, only refer to Sangamon County and each is contrary to the time and place requirements of the Criminal Code and (c) that the introduction into evidence of statements made by the defendant in the absence of counsel violated the due process clause of the Fourteenth Amendment to the Federal Constitution.

Ill. Rev. Stat. 1963, chapt. 38, Sec. 111-3, in force at the time of the offense, reads in part as follows:

> "(a) A charge shall be in writing and allege the commission of an offense by:
>
> ...
>
> (4) Stating the time and place of the offense as definitely as can be done; ..."

Defendant was represented by the Public Defender. On motion of the prosecution made just prior to the start of the bench trial, the court allowed an amendment to the indictment to reflect March 18 rather than March 20 as the occurrence date. Defendant objected to the amendment for the reason that it was not a formal defect within the precise language of the Code authorizing amendments for formal defects in certain instances. Ill. Rev. Stat. 1963, chapt. 38, Sec. 111-5.

In People v. Hall, 55 Ill. App. 2d 255, 204 N.E. 2d 473, we had occasion to comment on this statute and to state that the word "including" as used in the statute enumerating the specific grounds for amendment should be read as "including but not limited to". There we held that an incorrect citation

of the statute allegedly violated was amendable and that no constitutional, statutory, or fundamental human right of the defendant was violated by so doing. It did not appear there nor does it appear here that there was a total failure to comply with one or more of the requirements of ¶ 111-3 of the Code. There, as here, the defect was not of total omission, but of inept and inaccurate attempted compliance. We think it clear that there is a vast difference between total want of compliance and an attempted compliance inexpertly, inaccurately or inadequately done. The former may well be vulnerable to a proper motion timely made; the latter may well be formal and amendable. There is no showing in this record that the defendant was mislead, prejudiced, surprised or deprived of any available defense by the amendment. In permitting the amendment, the court corrected, perfected and made accurate an allegation required by the statute. It did not supply a wholly absent allegation. Each count fully and correctly stated the nature and the elements of the offense charge. Only the date of its occurrence was inaccurately stated. This, in our judgment, was a formal rather than a substantive defect and within the ambit and the purpose of ¶ 111-5 permitting the correction of formal defects by amendment. To return these indictments to the grand jury for correction is to impose a straight jacket long since discarded and to bow in submission to formal rather than substantive defects.

We now turn to the complaint that the place of the occurrence is insufficiently stated and thus voids the indictment. This contention was recently and effectively interred by our Supreme Court in People v. Blanchett, 33 Ill. 2d 527, 212 N.E. 2d 97, wherein it departed from the doctrine pronounced in People v. Williams, 30 Ill. 2d 125, 196 N.E. 2d 483, and reversed a decision of this court entertaining the views here advocated by the defendant. 55 Ill. App. 2d 141, 204 N.E. 2d 173.

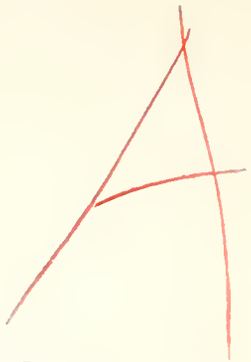
Defendant's last contention that the introduction in evidence of statements made by the defendant on arraignment and in the absence of and without benefit of counsel violated the due process clause of the Fourteenth Amendment to the Federal Constitution. During the arraignment the defendant was tendered counsel, refused it and stated he wanted to plead guilty. The plea was accepted. Defendant then stated that he had a detective call over for him and he was told that if he pleaded guilty to aggravated assault, the remaining charges would be dropped and that was why he pleaded guilty. The trial judge promptly and properly recanted, entered a "not guilty" plea over defendant's protest, appointed the Public Defender to represent him and continued the case for trial. The bench trial which we review was subsequently conducted by a different judge. Cross-examination of the defendant elicited this testimony from the defendant concerning the arraignment events:

> "I remember telling the court I wanted to plead guilty and my answer, "Here is the thing. I realize that I am guilty. I was drunk. I don't remember too much about it myself because I was drunk." I recall my answer to the court, "I didn't realize until a couple of days ago that I went by this woman's house. I didn't mean to rape her."
>
> "The reason I was so anxious to plead guilty to these charges on the 26th was that I was told by a person over at the County Jail by the name of Mr. Charlie Haun that if I would go over there and plead guilty and then bring it up about how my name was misspelled that they would throw it out."

We would observe that the statements made on arraignment were made after tender and refusal of legal counsel and effectively precluded the arraignment judge from accepting a guilty plea. It did not deter the trial judge from a not guilty finding on the burglary charge. We see no violation of due process or prejudicial error in this record. Absent this cross-examination, the evidence in the record establishes the defendant's guilt beyond a reasonable doubt. We conclude that the defendant had a fair trial with proper regards for his rights and the judgment must be affirmed. This is, accordingly, done.

Judgment affirmed.

Trapp, P.J. and Craven, J. concur.



50573

66 I.A.2 178

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
WILLIE J. MINGO and FREDERICK L. SAWYER,
Defendants-Appellants.

Appeal from Circuit Court of Cook County, Criminal Division.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

In a trial by the court without a jury, the defendants were convicted of burglary of a cleaning establishment. They were apprehended at the premises under circumstances that admit of no reasonable doubt as to their guilt. They do not question the sufficiency of the evidence but contend that a statement to the court made by their counsel during the hearing in mitigation and aggravation shows that they were denied effective, good faith assistance of counsel in the conduct of the trial. They ask for a new trial or in the alternative for a new hearing in mitigation and aggravation.

The statement complained of is as follows:

> "Well, Your Honor, all I can say is that I had hopes that these defendants will sometime see their faults and come to the realization that this is serious business and I hope that Your Honor will take into consideration that they—well, they are old enough to know better. There is something lacking that they don't face up to it or want to acknowledge it and they ask for mercy in this Court."

These words standing alone do not give a correct picture of defense counsel's conduct of the case. Defendants point to no omission or error made by counsel and an examination of the record shows that he was alert, that he made proper objections with respect to evidentiary matters which were frequently sustained, and that he vigorously and capably conducted cross-examination.

Defendant Mingo who had a substantial record of prior convictions was sentenced to imprisonment for 3 to 7 years and defendant Sawyer who had one prior conviction was sentenced to imprisonment for 2 to 5 years. There is no showing of any matter in mitigation that might have been raised in the trial court. The defendants were properly defended and the sentences imposed are reasonable.

What we have said should not be construed as any reflection on the counsel for the defendants in this court who with due zeal and ability have performed their duty in this and other cases that have come before us.

Judgment affirmed.

Dempsey, P.J., and Sullivan, J., concur.

Abstract only.

50250
50622

66 I.A.2d 270

MARGARET KAPUT, a/k/a MARGE KAYE, Plaintiff-Appellee, v. WALTER KAPUT, a/k/a WALTER KAYE, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT OF COOK COUNTY. (Consolidated appeals) #50250 #50622

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

These are consolidated appeals from two orders entered by the lower court in favor of plaintiff.

On January 6, 1949, plaintiff and defendant separated. One child was born as a result of the marriage between the parties; namely, John Kaput, a/k/a John Kaye, who was two years of age at the time of the separation. Custody, plus a $10.00 a week order for support, was granted to plaintiff pursuant to a decree of divorce entered October 19, 1949. Plaintiff, however, left the child with defendant. The child lived with his father and paternal grandparents continuously until on or about October 1, 1960.

Defendant raised and educated the child, paying the paternal grandparents $10.00 per week for food and lodging. He also paid for the child's clothing and other living expenses, from the date of the decree, to October 1, 1960, a period of 10 years 11 months and 12 days. The child sometimes stayed with plaintiff on week ends. There was conflicting testimony as to whether or not plaintiff contributed to the child's support during this period. Subsequently, the child lived with his Aunt Sally Matt, until March 31, 1961, plaintiff and defendant contributing equally toward his support. On March 31, 1961, plaintiff took actual custody of the child.

On July 19, 1962, defendant was served with notice that plaintiff was going to appear before the court on July 12, 1962, and present a petition asking the court to find defendant in contempt for an arrearage in child support in the sum of $2,680.00 and praying that said sum be reduced to judgment. At no other time had plaintiff sought to recover

child support until she filed this petition.

Plaintiff's petition stated that defendant paid child support from time to time; that he had made no payments since September 1, 1958; that prior to said date he was in arrears in the sum of $720.00; and that since said date he had accumulated a further arrearage of $1,960.00 or a total of $2,680.00. Nowhere in said petition did plaintiff allege that at times during that period for which she was claiming an arrearage, the child was living with his father and paternal grandparents.

Defendant contacted plaintiff by telephone and inquired as to the reason for her petition. He expressed great concern about said petition. He visited plaintiff at her home and asked her to give him a signed statement that she would not appear in court. She refused to give him a signed statement.

On July 12, 1962 plaintiff presented said petition. Defendant failed to appear and judgment was entered against him for $2,680.00.

Defendant, pursuant to Section 72 of the Civil Practice Act, filed a petition to vacate the judgment. Defendant alleged, one, that he was diligent in that he was not advised of said judgment until served with notice August 12, 1963 that plaintiff was appearing before the court August 15, 1963 to ask for a ruling, and two, that he had a good and meritorious defense. Defendant's petition was denied. Subsequently, notice of appeal from said order was filed by defendant in the trial court and is heard in this consolidated appeal as #50250.

On April 2, 1965 plaintiff filed her petition in the trial court for attorney's fees to contest defendant's appeal, pursuant to the Divorce Act; Illinois Revised Statute (1963) Chapter 40, Section 15. Defendant challenged the jurisdiction of the trial court on the ground that the order appealed from was not a suit for divorce and therefore, the trial court could not derive its jurisdiction from the Divorce Act. Counsel for plaintiff showed the Appellate Record to the court, advised the court of the extent of the master's hearings and requested an award

of Fifteen Hundred Dollars in attorney's fees for the prospective defense of the appeal. The court interrogated plaintiff as to her financial status. Plaintiff testified that she had no monies with which to employ counsel to defend the appeal. Counsel for defendant was allowed to cross-examine plaintiff.

Thereafter counsel for defendant stated to the court that his client had no monies to pay plaintiff's attorney's fees. Plaintiff then advised the court that defendant had inherited an interest in a piece of real estate and that he was not impoverished. The court allowed counsel for plaintiff and counsel for defendant to sum up their clients' positions. The court verbally ruled that it had jurisdiction and awarded plaintiff's $1,000.00 in attorney's fees for the defense of said appeal. Immediately after the court's ruling and pronouncement, counsel for defendant informed the court that defendant was without funds to pay the said One Thousand Dollars. Counsel asked that the court allow him to file a written answer to plaintiff's petition, and have the matter set for further hearing. The court denied the request of defendant's counsel. In #50622 defendant has appealed from the order allowing plaintiff attorney's fees.

Defendant's theory in #50250 is that he was diligent in bringing his petition to vacate the judgment; that a meritorious defense of fraud was raised by him; and that the lower court's findings that the judgment of July 12, 1962 was not fraudulently obtained, was against the manifest weight of the evidence.

Plaintiff's theory is that the judgment entered on July 12, 1962 was in all instances legally sufficient; that defendant has not sustained his burden of proving the facts essential to entitle him to relief under Section 72 of the Civil Practice Act; and that the findings of fact by the master upon conflicting evidence and conflicting testimony of witnesses will not be reversed, on appeal, unless the error is clear and palpable.

We agree with plaintiff. Specific findings of fact were made by the master and his report containing said findings of fact was approved in its entirety by the trial judge. There is a presumption, on review, that the evidence sustains the findings. Gromer v. Molby, 385 Ill. 283, 286, 52 N.E.2d 772 (1944). A master's report on controverted questions of fact, containing findings based on the evidence presented, when approved and made more specific by the trial judge, will not be reversed unless the error is clear and palpable. Allendorf v. Daily, 6 Ill.2d 577, 586, 129 N.E.2d 673 (1955). There was conflicting evidence and testimony by the parties concerning; one, whether plaintiff made false representations to induce defendant to forego making his appearance in court, and two, whether plaintiff made certain allegations in her petition that were untrue. We agree with plaintiff that the evidence presented by plaintiff was sufficient to support the findings made by the master and approved by the trial judge, and that these findings are not contrary to the manifest weight of the evidence.

Furthermore, to entitle a party to relief against a judgment or decree, the burden of proof is upon the moving party, first, to prove the invalidity of the judgment or decree, and two, to show that diligence was exercised. The master found that defendant did not meet his burden. An examination of the record reveals that defendant's petition was properly refused.

In #50622 defendant contends that the action involved in #50250 was not a divorce or separate maintenance suit and that the trial court could not grant fees for defense of an appeal of said action. Defendant bases this contention on the theory that by filing an appeal, appellate jurisdiction attached, and the trial court could not grant fees for a defense of the appeal. We disagree with defendant. In the case of an appeal, the court in which the decree or order is rendered may grant, and enforce, the payment of money, for the defense of an appeal, during the pendency of the appeal. Saxon v. Saxon, 20 Ill. App.2d 478, 156 N.E.2d 229 (1959).

Defendant also contends that it was improper for the trial court to grant fees without hearing evidence as to the work done and the value of the services rendered. An examination of the record shows there was evidence submitted as to how much work would be involved in defending the appeal. The trial court evaluated this evidence and found in favor of plaintiff. We will not disturb the lower court's decision.

The decision of the lower court is affirmed as to both appeals.

JUDGMENT AFFIRMED.

BRYANT, P.J., and BURKE, J., concur.

50612

HAZEL PARKINSON,	)	(66 I.A.2 405)
	)	
Plaintiff-Appellant,	)	APPEAL FROM
	)	
v.	)	CIRCUIT COURT,
	)	
ELSIE HILL,	)	COOK COUNTY.
	)	
Defendant-Appellee.	)	

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiff's libel action was dismissed for want of prosecution on February 3, 1965. On February 19, 1965, and again on March 18, 1965, the court denied plaintiff's petitions to vacate the order of dismissal and to reinstate the cause. Plaintiff appeals. Defendant has filed no brief.

The complaint was filed in the Circuit Court of Cook County on May 16, 1958. An answer was filed on July 3, 1958, and the case was at issue. The order of February 3, 1965, which dismissed the cause for want of prosecution shows that it came "on to be heard upon the regular call of cases for trial."

We have examined the pleadings and both of the petitions filed by plaintiff to vacate the order of dismissal. In our opinion they show a meritorious claim and due diligence and require no discussion.

At the time of dismissal, the case had been awaiting trial for seven years. The first petition to vacate the order of dismissal was presented within sixteen days after the order was entered. Courts in this state are liberal in setting aside defaults or orders of dismissal during the term time in which they are entered, when it appears that justice will be done. (Dann v. Gumbiner, 29 Ill. App.2d 374, 379, 173 N.E.2d 525 (1961).) Under paragraph 24a of the Limitations Act (Ill. Rev. Stat. 1963, Ch. 83), a plaintiff

who has suffered an involuntary dismissal is given a year to file a new action, "if the time limited for bringing such action shall have expired during the pendency of such suit." (Wright v. Chicago Transit Authority, 43 Ill. App.2d 408, 193 N.E.2d 597 (1963).) We believe the petitions sufficiently presented to the trial court a situation which required the use of the power to set aside a dismissal order and permit the plaintiff to have his day in court, and to prevent an injustice.

The orders denying the motion to vacate are reversed and the cause is remanded with directions to allow the motions and to restore the cause to the trial calendar.

REVERSED AND REMANDED WITH DIRECTIONS.

KLUCZYNSKI, P.J., and BURMAN, J., concur.

Abstract only.

50097

(66 I.A.2 405)

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
EUNICE L. EASLEY,
Defendant-Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY
CRIMINAL DIVISION

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

In a trial without a jury Eunice L. Easley was found guilty of the crime of aggravated battery as charged in the indictment and sentenced to a term of 3 to 8 years in the penitentiary. In appealing he requests that the judgment be reversed on the ground that the People failed to prove him guilty beyond a reasonable doubt.

The complainant, Ethel Brown, testified that at about 4:00 P.M. on May 30, 1964, she was shot in the back by the defendant while in her sister's kitchen at 1535 South Lawndale Avenue, Chicago. The defendant had come to complainant's apartment at the invitation of her niece. Mrs. Brown testified that until one week prior to the shooting she was on the most intimate terms with the defendant; that the defendant walked into her apartment and questioned her as to the reason she had "quit him"; that as she turned around he shot her in the left side and that she then began to scuffle with him. Janie Nellem, sister of Mrs. Brown, testified that she was awakened by the commotion. She ran into the kitchen and saw complainant holding onto defendant. Defendant was trying to break loose and Miss Nellem "grabbed" him. Defendant exclaimed: "I am going to jump out the window and make them think you all throwed me out." She saw the gun in defendant's right hand. He placed the gun to witness' stomach, pushed his head against the screen and said "I am going to jump." Witness further testified that she said "jump" and turned him loose. The witness came into the room after the shot was fired. She was holding defendant around the waist. He was trying to get loose. The gun was in defendant's right hand. She knew him about 2 years. She said defendant was "friendly and nice to me."

The Nellem apartment where the shooting took place was on the first or ground floor. Sam Cotton and Frank Walker testified that they saw the defendant lying on the ground in a pool of blood. Defendant was resting on his back with the gun in his right hand across his chest. Walker picked up the gun and after wrapping it in a handkerchief, took it to the home of William Jenkins. Policeman James Davis testified Walker accompanied him to the Jenkins' residence where the gun was recovered.

The defendant, testifying in his own behalf, said that he was making love to Ruth Rhodes when the complainant walked in on the scene; that complainant left and soon returned with a gun and in a jealous outburst threatened to shoot the defendant. He testified that as he grabbed her hand, he was hit on the head with a bottle and was thrown out the window. He claimed not to be aware that a shot was fired. After the finding of guilty in response to the inquiry by the court as to whether there was anything to be presented in aggravation or mitigation, the People brought out that on February 19, 1958, the defendant was convicted on "a murder charge, reduced to manslaughter" and sentenced to a term of from 5 to 12 years in the penitentiary and that at the time of his arrest was on parole. In mitigation the defendant's attorney pointed out that the defendant has a minimal education.

The finding and judgment will not be disturbed unless it is based on clearly unsatisfactory and improbable evidence. We will not reverse merely because there is a conflict in the evidence. We are satisfied that the record supports the finding of the court that the defendant was proved guilty beyond a reasonable doubt. Therefore the judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and LYONS, J., concur.

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PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, v. ROBERT QUINLAN, (Impleaded) Plaintiff in Error.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY CRIMINAL DIVISION

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This appeal comes from a finding of guilty of armed robbery entered March 27, 1963 in the Circuit Court of Cook County, Criminal Division. This appeal is taken on the grounds that the indictment was not specific enough to enable the appellant to adequately prepare his defense and that he was not proved guilty beyond a reasonable doubt.

The appellant claims the indictment was insufficient in that it did not specifically state either the place where or the time at which the alleged offense occurred. In support of this proposition is cited the case of People v. Williams, 30 Ill.2d 125, 196 N.E.2d 483 (1964). We need not discuss that case for it has been specifically overruled in the case of People v. Reed, ____Ill.2d_____, _____N.E.2d _____ (Docket No. 39251, September, 1965). The indictment in the case at bar sets forth the date and the county in which the offense was alleged to have occurred. The Reed opinion, supra, holds that this is sufficient. At trial no objection was made to the indictment not being specific enough and after reading the record we cannot say that the appellant was prejudiced by the indictment's not being more specific.

After having reviewed the transcript of the proceedings below, we conclude that the appellant was proven guilty beyond a reasonable doubt. The appellant, Robert Quinlan, was indicted with another man, Donald Whitlock, and was charged with the armed robbery September 23, 1962 of a drug store located at 5845 W. Madison Street. The owner of the drug store, Harry Dombrowski, testified that he came to work that morning at about 11:00 o'clock. He testified that at about 11:30 a man came into the store who demanded his supply of narcotics at gun

point. Dombrowski said he gave this man some narcotics and some money from the rear of the store. He was then told to lay down on the floor in the rear of the store and not to get up for two or three minutes. He was told by the man that his partner would be near the door to see that he stayed there. Dombrowski never saw another man and cannot say whether the man actually had a partner or not. He testified that when he closed the store that afternoon, he noticed that there was money missing from a cash register located near the front of the store. He said there was nine or ten dollars in that cash register. Dombrowski identified the man who robbed him as appellant's co-defendant, Donald Whitlock.

Kenneth Derma, a high school student and part-time employee at the drug store, testified that he arrived for work that morning at 11:30. As he approached the store, he encountered a man at the front entrance. This man held the door shut and said, "Get out of here, kid." Derma then waited outside the store a few moments and watched through a plate glass window while the man went inside, walked behind a cigar counter near the front of the store and dusted off the cash register. Derma then ran to a nearby tavern and called the police. Derma testified that the man was wearing gray work clothes with a small brimmed hat and carrying a mop. Derma identified the appellant from a police line-up a few days later.

Hazel Reilly, a woman who lives near the drug store, testified that she looked out of her apartment window around 11:00 that morning and saw a man walking outside carrying a bucket and mop. She said she saw him again at about 11:40 when she was on her way back from mass. She testified that he was not wearing a hat.

The appellant took the stand in his own defense and testified that he was at home at the time the robbery occurred. He said his mother and nephew could substantiate his claim. Neither person appeared at trial.

We feel the evidence supports the Court below in finding the appellant guilty of the crime of armed robbery. The evidence supports the People's theory that the appellant and his co-defendant at the trial acted in consort in robbing the drug store. The man who held the gun on Dombrowski said he had a partner outside the store. At the time the robbery was going on, Kenneth Derma was stopped by the appellant who told him to get away. Derma then saw the appellant enter the store and wipe off the cash register in front. The appellant claims that at most this shows that he committed a robbery, but that this cannot be held armed robbery because no connection was shown between him and the man who had the gun and who was robbing Dombrowski in the back of the store. The Court does not have to believe that by chance this drug store was being robbed by two different people at the same time. There is a reasonable inference that the men were acting in consort. We feel the appellant was sufficiently identified even though there was some small discrepancy between the testimony given by Derma and Mrs. Reilly. The finding of the Court below is supportable by the facts adduced at the trial. The judgment is, therefore, affirmed.

JUDGMENT AFFIRMED.

LYONS, J., and BURKE, J., concur.